

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

DESERT PETROLEUM, INC., dba GASCO,  
adba UNOCAL, adba ULTRAMAR, adba,  
ARCO, adba BP,

Debtor.

Case No. LA 92-14240-RR

WILLIAM BERNARD BOHLIN,  
MARGARET, ANNE TURNLEY, REGINA  
R. NORMAN, and REGIS ROBERT  
BOHLIN,

Plaintiffs,

Adversary No. 92-5207

vs.

**MEMORANDUM OPINION**

TIDEWATER OIL COMPANY, DESERT,  
PETROLEUM, INC., TOSCO  
CORPORATION, PHILLIPS PETROLEUM  
COMPANY, OIL SHALE CORPORATION,  
LION OIL COMPANY, and DOES 1  
through 50, inclusive,

Defendants.

I. INTRODUCTION

This case comes before the Court on the Plaintiffs' and the Debtor Co-defendant's Motions for Remand and Abstention and on the Co-defendant Phillips Petroleum's Motion for Change of Venue. Robert Bass and George Yaron appeared for Desert Petroleum, the

Debtor. Jeffrey Lawson appeared for the Plaintiffs. Norman DuPont appeared for Phillips Petroleum. Hendrik de Jong appeared for Tosco Corporation. Christopher Berka appeared for Texaco, Inc.

Both Adversary Proceeding No. 92-5207 and Adversary Proceeding No. 92-5269 derive from the removal of the same state court case, which is Civil Case No. 706797 from the Santa Clara County Superior Court. Based on the following findings of fact and conclusions of law, the Motions for Remand and Abstention are granted, and the Motion for Change of Venue is denied.

## II. FACTS

The case which Co-defendants Phillips Petroleum and Tosco Corporation have sought to remove to this Court arises in connection with Plaintiffs' claims for liability for the environmental contamination of the real property located at 3105 McKee Road in San Jose, California. The two remaining Plaintiffs are almost seventy years old and in poor health and are the heirs to William J. and Maude E. Bohlin (the "Bohlins"), who originally owned the subject property. The Bohlins leased the property to Tidewater Oil Company ("Tidewater") in May 1961 for the purpose of operating a gasoline service station. Tidewater assigned its leasehold interest to Phillips Petroleum ("Phillips") in October 1966. In 1976, Phillips assigned its interest to Tosco Corporation ("Tosco"), which in turn assigned the leasehold interest to Desert Petroleum in 1979. During the period that Tidewater, Phillips, and Tosco occupied the property, each operated a gasoline service station on the property. Desert Petroleum leased and operated a

1 gasoline service station on the property from  
2 1979 until March 1990 when the original lease terminated.

3       The Plaintiffs took possession of the property in March 1990  
4 and became aware of the environmental contamination sometime  
5 thereafter. On November 16, 1990, the Plaintiffs filed a civil  
6 action in the California Superior Court, Santa Clara County against  
7 the original lessor of the property as well as the subsequent  
8 sublessors and various other unnamed parties. The state court  
9 complaint alleges causes of action based on breach of contract,  
10 negligence, strict liability, and other tort causes of action  
11 relating to the environmental contamination of the property. At a  
12 Case Management Conference held on January 14, 1992, this case was  
13 set for trial on April 20, 1992.

14       On February 11, 1992, Desert Petroleum filed a voluntary  
15 petition under Chapter 11 of the Bankruptcy Code in the Bankruptcy  
16 Court for the Central District of California. Notice of the  
17 petition was served upon counsel for the parties to the Superior  
18 Court civil action.

19       Phillips filed Notice of Removal of the state court action to  
20 this Court on April 14, 1992. Tosco filed a separate Notice of  
21 Removal to this Court on May 7, 1992. Both the Plaintiffs and  
22 the Debtor have filed Motions for Remand and Abstention. Phillips  
23

24  
25 has also filed a Motion for Change of Venue of the action to the  
26 Central District of California where the Debtor's Chapter 11 is  
27 pending. The Court has noted that the removal that is sought is  
28 not for the benefit of the Debtor, which vehemently opposes

1 removal. In fact, removal is being sought solely to benefit the  
2 non-debtor parties to the state court litigation.

3  
4 II. DISCUSSION

5 A. Violation of the Automatic Stay

6 Section 362 of the Bankruptcy Code enjoins the commencement or  
7 continuation of a proceeding against the debtor. 11 U.S.C. §  
8 362(a). (West 1979 & Supp. 1992). Any actions taken in violation  
9 of the automatic stay are void and without effect. In re Sambo's  
10 Restaurants, Inc., 754 F.2d 811, 816 (9th Cir. 1985). Phillips has  
11 argued that the removal of an action to the bankruptcy court does  
12 not fall within the purview of Section 362. However, the Court is  
13 persuaded otherwise. Bankruptcy Rule 9027 sets forth the procedure  
14 by which an action may be removed to the bankruptcy court. Fed. R.  
15 Bankr. P. 9027 (West 1984 & Supp. 1992). The Advisory Committee  
16 Note to Bankruptcy Rule 9027 provides that if the claim or cause of  
17 action which is removed to the bankruptcy court is subject to the  
18 automatic stay of Section 362 of the Code, the litigation may not  
19 proceed in the bankruptcy court until relief from the stay is  
20 granted. Fed. R. Bankr. P. 9027 advisory committee note (1983).

21  
22  
23 Phillips failed to move the bankruptcy court in the Central  
24 District of California to grant relief from the automatic stay  
25 prior to filing its Notice of Removal. Although Phillips has since  
26 filed a motion for relief from the stay, the motion has yet to come  
27 before the Bankruptcy Court in the Central District of California  
28 for disposition.

1 The Court finds In re Republic Oil Corp., 59 Bankr. 884, 886  
2 (W.D. Ky. 1986), which was cited in the Debtor's Memorandum of  
3 Points and Authorities, to be persuasive authority on the issue of  
4 the effect of the stay on the removal of an action. Therefore, the  
5 Court finds that Phillips' removal of this action to the bankruptcy  
6 court to be void ab initio. See In re Sambo's Restaurants, 754  
7 F.2d at 816.

8  
9 B. Motion for Change of Venue

10 In support of their argument for change of venue, counsel  
11 argues that the case lends itself to consolidated decision making  
12 because of the common issues of law and fact. In fact, the Court  
13 finds that there are not common issues of law and fact in the  
14 various environmental actions, except as they relate to the  
15 indemnification issues between the various Co-defendants.

16  
17 C. Mandatory Abstention

18 Even if this Court were not precluded from hearing this matter  
19 by Section 362 of the Bankruptcy Code, this Court is mandated to  
20  
21  
22 abstain from hearing this case by the abstention doctrine set forth  
23 in Section 1334(c)(2) of Title 28, United States Code. 28 U.S.C. §  
24 1334(c)(2). Section 1334(c)(2) provides that abstention is  
25 mandatory if three elements are satisfied:

26 (1) The case is based upon a state law claim or cause of  
27 action which, although related to a case under Title 11, does not  
28 arise under Title 11 or arise in a case under Title 11;

1 (2) The case could not have been commenced in federal court  
2 absent bankruptcy court jurisdiction; and

3 (3) The case could be timely adjudicated in a state court.  
4 28 U.S.C. § 1334(c)(2).

5 With respect to the first element, the civil action is based  
6 exclusively on state law claims in tort and breach of contract.  
7 Also, the action does not arise under Title 11 or arise in a case  
8 under Title 11.

9 Secondly, this case could not have been commenced in federal  
10 court because there is no diversity of citizenship among the  
11 parties, and it does not involve a federal question. The Debtor  
12 and the Plaintiffs are California citizens; therefore, there is no  
13 diversity of citizenship. A case involves a federal question if  
14 federal law creates a cause of action. As stated earlier, the  
15 claims in this case are based exclusively on state law.

16 The presence of the third element is the most compelling in  
17 this analysis. Not only could this case have been timely  
18 adjudicated in a state court, but this case was set to be tried in

19  
20  
21 the Superior Court within a week at the time Phillips filed its  
22 Notice of Removal. It appears to the Court that the Notice of  
23 Removal was filed as a litigation tactic and for the purpose of  
24 delay. All three elements of Section 1334(c)(2) are present in  
25 this case; therefore, it would be appropriate to remand this case  
26 under the mandatory abstention doctrine.

27  
28 D. Motion for Sanctions

1       One matter remains for this Court to determine, and that is  
2 the Debtor's request for attorneys' fees and costs in the amount of  
3 \$2,474.00. After considering the circumstances of the removal and  
4 the reasonableness of the fees, the Court awards the Debtor  
5 attorneys' fees and costs of \$2,474.00 under 11 U.S.C. § 362(h) and  
6 28 U.S.C. § 1447(c), payable by Phillips for its willful violation  
7 of the automatic stay and for its improper removal of this action.

8       This action is remanded to the Superior Court of the State of  
9 California, Santa Clara County.

10  
11 DATED:

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UNITED STATES BANKRUPTCY JUDGE